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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,

Appellant,

—against—

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON, and THOMAS J. D'AMORE, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK, JOINED BY THE STATES OF ALABAMA, ARIZONA, DELAWARE, FLORIDA, ILLINOIS, LOUISIANA, MAINE, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, TENNESSEE AND WYOMING IN SUPPORT OF APPELLANT

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Interest of Amici Curiae

The State of New York, joined by the states of Alabama, Arizona, Delaware, Florida, Illinois, Louisiana, Maine, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee and Wyoming, submits this brief *amicus curiae* in

support of appellant, urging reversal in order to protect the states' rights to conduct and control the electoral processes in their states.

The *amici curiae* have a strong interest in the management of primary elections within their respective states. They all regulate primary elections to some degree. Many of them provide money, personnel and equipment for primary elections. Results of the primaries are generally certified by the states.

Some of the *amici* have statutes similar to Conn. Gen. Stat. § 9-431, which require a voter to be enrolled in a political party in order to vote in a primary election.[1] Thirty-eight states have such statutes, and all of these statutes are directly threatened by the Second Circuit's ruling in this case.

Two of the *amici* states do not require party enrollment as a prerequisite to participation in primary elections.[2] However, the holding of the Second Circuit significantly threatens the election statutes in those states because it leaves political parties virtually free to manipulate the primary process as they see fit. The states which have open primaries provide for them by statute, and those laws would be equally threatened.

The statutory schemes of every state in the Union which govern primary elections are brought into question by the broad rationale of the Second Circuit's decision. As both the Second Circuit and the District Court in this case recognized, the issues in this litigation have profound implications for electoral regulation nationwide. Thus, New York and the other *amici* states have a keen interest in protecting their rights to regulate the primary elections within their respective electoral systems.

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[1] *See, e.g.*, Ariz. R.S. § 16-467; 21-A Me. R.S.A. § 143; N.Y. El. L. § 8-302.4; N.C. Gen. Stat. § 163-59; Tit. 26 Okla. Stat. § 1-104; Wyo. El. Codes § 22-5-212.

[2] *See, e.g.*, La. R.S. § 18:401 *et.seq.*; N.D. Cent. Code § 16.1-11-22.

Summary of Argument

Article I, § 2 and the Seventeenth Amendment vest the power to regulate the electoral process in each individual state. Because the primary election has become an integral part of this electoral process, the constitutional provisions apply to primaries, as has been long recognized by this Court.

Primary elections are subject to the qualifications requirements of article I, § 2 and the Seventeenth Amendment to the United States Constitution. The distinction made by the court below – that regulating the substantive right to vote is separate and distinct from regulating the qualifications as to who may exercise that right – is arbitrary. The distinction is not supported by a logical reading of the Constitution or the constitutional history relied on by the court. Furthermore, the holding of this Court in *United States v Classic*, 313 U.S. 299 (1941), which established that primary elections were subject to the Constitution, did not make any artificial distinction such as that set forth by the Second Circuit.

A political party's freedom of association is not infringed by a state's regulation of qualifications for the primary electorate. State regulations which have a rational basis and do not violate any constitutional rights of the political parties are an appropriate exercise of the state's authority.

ARGUMENT

STATES HAVE AUTHORITY TO REGULATE THEIR PRIMARY ELECTIONS UNDER THE QUALIFICATIONS REQUIREMENTS OF THE CONSTITUTION.

I. *Primary elections are subject to the qualifications requirements of article I, § 2 and the Seventeenth Amendment to the United States Constitution.*

Section 2 of article I of the Constitution provides for the election of Members of the House of Representatives. Similarly, the Seventeenth Amendment provides for the election of United States Senators.[3] Each of these provisions mandates that the electorate for these positions "shall have the qualifications requisite for electors of the most numerous branch of the State legislature[s]." The Second Circuit was of the view that these qualifications requirements do not apply to primary elections. This position is based on an arbitrary reading of article I, section 2 and the Seventeenth Amendment, a reading which ignores years of precedent which holds that primaries are subject to constitutional regulation. Primaries form an integral part of the electoral process. Thus, contrary to the conclusion reached in the decision below,

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[3] The relevant part of section 2 reads as follows:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

The relevant part of the Seventeenth Amendment reads as follows:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifiations requisite for electors of the most numerous branch of the State legislatures.

the states' constitutional authority to regulate the qualifications of the general electorate includes the power to regulate the primary electorate.

Since the landmark cases of *United States v Classic*, 313 U.S. 299 (1941), and *Smith v Allwright*, 321 U.S. 649 (1944), the right of citizens to choose Representatives and Senators has included the right to participate in the primary elections for those positions.[4] *Classic* directly raised the issue of whether the right to vote in a primary election was secured by the Constitution.[5] This Court clearly held that primary elections were protected by article I, section 2:

> Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2.

Classic, 313 U.S. at 318.

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[4] It has since become widely recognized and accepted that primary elections that play a significant role in the choosing of candidates must meet these constitutional standards. *See, Nader v Schaffer*, 417 F. Supp. 837 (D. Conn.), *aff'd*, 429 U.S. 989 (1976); *Buckley v Valeo*, 424 U.S. 1, 13 (1976); *Anderson v United States*, 417 U.S. 211, 226 (1974); *Rosario v Rockefeller*, 410 U.S. 752, 768 (Powell, J., dissenting) (1973); *Oregon v Mitchell*, 400 U.S. 112, 120 (1970); *Reynolds v Sims*, 377 U.S. 533, 615 (Harlan, J., dissenting) (1964); *Stassen Committee v Jordan*, 377 U.S. 927 (Douglas, J., dissenting) (1964); *Gray v Sanders*, 372 U.S. 368, 380 (1963); *Terry v Adams*, 345 U.S. 461, 466 (1953); *Ray v Blair*, 343 U.S. 214, 226 (1952).

[5] Section 19 of the Louisiana Criminal Code had made it a crime to "injure" or "oppress" any citizen exercising his or her constitutional rights. The defendants in *Classic* had refused to count a black voter's ballot in a primary election for United States Representative and were convicted of violating section 19. The issue was whether their actions had violated any constitutional rights of the black voters.

Four years later, in *Smith v Allwright*, 321 U.S. 649, this Court followed the *Classic* holding and held that the Seventeenth Amendment also applies to the primary elections for United States Senators.

The Second Circuit's application of *Classic* to the immediate case distorts that case's holding and the purposes of article I, section 2 and the Seventeenth Amendment. In his opinion Judge Kaufman drew a distinction between the first and second clauses of section 2 of article I. *Republican Party v Tashjian*, 770 F.2d 265, 272-275 (2d Cir. 1985). He found that the first clause - "The House of Representatives shall be composed of Members chosen every second year by the People" - created the substantive right to participate in primary elections. He described the second clause - "and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature" - as separate and distinct from the first clause.

Judge Kaufman concluded, based on his reading of section 2, that the holding in *Classic* extended only to the substantive right to vote. Because the qualifications clause was separate and distinct from that right, he found that it did not extend to primary elections. *Tashjian*, 770 F.2d at 275. The court cited a plethora of historical material, including the Federalist Papers and the writings of James Madison, which indicates that the qualifications clause was the result of compromise between various factions among the framers of the Constitution. *Tashjian*, 770 F.2d at 273-274. Based on this historical analysis, Judge Kaufman created a distinction between the two clauses of section 2 and concluded that *Classic* and *Smith* did not contemplate the qualifications clause in their holdings.

We do not take issue with the accuracy of the court's discussion of the constitutional history. Its analysis, however, does not support the distinction between the two clauses that the court drew. The references to the Federalist and James Madison's journals show only that the qualifications clause was the result of

compromise between advocates of federal and state rights. They in no way support the artificial distinction that the court created between the two clauses of section 2 of article I.[6]

The first clause of section 2 creates the right of citizens to vote for Representatives; the second clause indicates who is entitled to exercise that right. To distinguish between these two, to conclude that one clause creates a substantive right, and that the other does not, is to create a distinction where none exists. Both clauses directly pertain to the exercise of this right and those entitled to utilize it.

In his opinion, Judge Kaufman states that the qualifications clause "speaks only to the mechanics of voting and was intended as a procedural safeguard to ensure the right of the people to select members of Congress without interference from the state legislatures". *Tashjian*, 770 F.2d at 274. The purpose of the qualifications clause, however, is not to establish election mechanics or procedural safeguards; these matters are governed by section 4 of article I.[7] *Oregon v Mitchell*, 400 U.S. 112, 125 (1972). Judge Kaufman's analysis mischaracterizes the qualifications clause and concludes, in essence, that section 2 is superfluous

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[6] Judge Kaufman noted that in an earlier draft the two clauses formed two different sentences. Based on this, the court concluded that the qualifications for voting are a mere "procedural safeguard," and not part of the substantive right to vote. No matter how the framers chose grammatically to deal with the qualifications clause, the qualification to vote is an integral part of the elective process. Indeed, because it determines *who* may vote, it is identical with the right to vote. *Tashjian*, 770 F.2d at 274, n.15.

[7] Section 4 reads as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

in that it serves no other purpose than that served by section 4. Any assumption that the framers intended section 2 to be superfluous is, of course, erroneous.[8]

The qualifications clause, because it determines who may exercise the right to vote established in the clause that preceded it, can only be read as an integral part of this right to vote. The division between the clauses relied on by the Second Circuit is arbitrary and serves no purpose.

The Second Circuit's finding that the *Classic* decision did not deal with the qualifications clause is not supported by a reading of that case. Reference to the qualifications clause is made throughout *Classic*:

> Such right as is secured by the Constitution to qualified voters to choose members of the House of Representatives is *thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by* § 2 and to the authority conferred on Congress by § 4, to regulate the times, places and manner of holding elections for representatives.
>
> * * *
>
> Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, *the states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.*

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[8] The seminal case of *Marbury v Madison* addressed this issue in the following way:

> It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it. 5 U.S. (1 Cranch) 137, 174 (1803).

* * *

> Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, *the qualifications of which it prescribes*. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, *and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution* and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right.

Classic, 313 U.S. at 310, 313, 314 (emphasis supplied).

The Court explicitly discussed the qualifications clause in this passage:

> While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states [citations omitted], this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Classic, 313 U.S. at 315.

Notably, there is no discussion in *Classic* treating the "qualifications" to vote as distinct from the right to vote itself. The court below has shown no rational reason to create this distinction, and *Classic* has clearly addressed this right as a whole. To find that the right to vote in a primary enjoys constitutional protection, yet the qualifications of those entitled to exercise that right does

not, is contrary to the plain reading of the Constitution and this Court's holding in *Classic*.

In today's political arena, where the primary election has become such an integral part of the electoral process, the Second Circuit's holding that primary elections are not subject to the constitutional provisions of section 2 of article I and the Seventeenth Amendment is archaic at best. Even at the time of *Classic*, the importance and significance of primary elections were well established. The argument that because the primary system was not contemplated by the framers it should not be subject to the Constitution is not persuasive. As noted in *Classic*:

> [I]n determining whether a provision of the constitution applies to new subject matter, it is of little significance that it is one with which the framers were not familiar.

313 U.S. at 315.[9] *See also, McCulloch v. Maryland*, 17 U.S. (4 Wheat) 159, 200, 203-204 (1819); *Opp Cotton Mills, Inc. v Administrator*, 312 U.S. 126, 145-146 (1941).

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[9] The Court's analysis of this issue is particularly incisive:

> We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication, which are concededly within it. * * * There is no historical warrant for supposing that the framers were under the illusion that the method of effecting the choice of the electors would never change or that, if it did, the change was for that reason to be permitted to defeat the right of the people to choose representatives for Congress which the Constitution had guaranteed.

Classic, 313 U.S. at 315-316, 318.

Finally, we note that particulars of any state's law regulating primaries must of course meet constitutional standards. Nonetheless, the possible constitutional infirmity of a statute does not affect the general applicability of section 2 of article I or the Seventeenth Amendment. At one point in its opinion, the Second Circuit addresses various types of state primaries, and finds them constitutionally defective. *Tashjian*, 770 F.2d at 275. These infirmities, however, are based on violations of other provisions of the Constitution, and do not affect the applicability of article I, section 2 and the Seventeenth Amendment.

II. *Article I, §2 and the Seventeenth Amendment give the States the power to regulate the constitution of the electorate.*

In *United States v Classic*, 313 U.S. 299 (1941), this Court made it clear not only that article I, sections 2 and 4 apply to primary elections, but also that the states, within the limits of the Constitution, have the authority to regulate those elections. In referring to article I, sections 2 and 4, the Court said in *Classic*:

> Such right as is secured by the Constitution to qualified voters to choose members of the House of Representatives is thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by § 2 and to the authority conferred on Congress by § 4, to regulate the times, places and manner of holding elections for representatives.

Classic, 313 U.S. at 310. The Court then stated that

> [p]*ursuant to the authority given by § 2 of Article I of the Constitution*, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, *the states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many*

> *other states, Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections*, and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary.

Classic, 313 U.S. at 311 (emphasis supplied). The states are thus fully within constitutionally authorized limits when they exercise their discretion to regulate the type of primary system to be used within their boundaries.

The *Classic* opinion, with reference to the specific issues raised in that case regarding the applicability of federal criminal statutes to primary elections, went on to say that

> * * * to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.

Classic, 313 U.S. at 320. In the absence of congressional action, the constitutional intention was that the states had the authority to control elections, both general and primary, within the strictures of other dictates of the Constitution.[10] *Classic*, 313 U.S. at 316, 319. Thus, in an opinion by Justice Douglas, citing *Classic*, *id.* at 315, this Court subsequently stated that

> * * * while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*,

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[10] Moreoever, even without Article I, section 2 and the Seventeenth Amendment, this Court has said that "one of the powers reserved to the States under the Tenth Amendment is the regulation of the State elections". *Oregon v Mitchell*, 400 U.S. at 124-125.

> 110 U.S. 651, 663-665; *Smith v Allwright*, 321 U.S. 649, 661-62) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.

Lassiter v Northampton County Board of Elections, 360 U.S. 45, 51 (1959); *see also, Smith v Allwright*, 321 U.S. at 659-660, 664-665.

Since these decisions, the Court has consistently recognized that the states have the power to impose voter qualifications and otherwise to regulate access to the franchise. *Dunn v Blumstein*, 405 U.S. 330, 336 (1972); *see also, McDonald v Board of Elections*, 394 U.S. 802, 807 (1969). Further, they have a legitimate interest in regulating the number of candidates on the ballot at a general election, thereby requiring a primary or convention nomination procedure. *See, Illinois State Board of Elections v Socialist Workers Party*, 440 U.S. 173, 184-185 (1979); *American Party of Texas v White*, 415 U.S. 764, 781 (1974); *Bullock v Carter*, 405 U.S. 134, 145 (1972). The interest of the states in ensuring that "the critical role played by political parties in the process of selecting and electing candidates for state and national office * * * is conducted in a fair and orderly fashion is unquestionably legitimate". *Marchioro v Chaney*, 442 U.S. 191, 196 (1979). In *Storer v Brown*, 415 U.S. 724, 730 (1974), it was recognized that

> as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.[11] In any event, the

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[11] *See also, Anderson v Celebrezze*, 460 U.S. 780, 789 (1983); *American Party of Texas v White*, 415 U.S. at 780-781; *Kusper v Pontikes*, 414 U.S. 51, 59-61 (1973); *Rosario v Rockefeller*, 410 U.S. 752, 760 (1973); *Jenness v Fortson*, 403 U.S. 431, 437-438 (1971); *Smith v Allwright*, 321 U.S. at 657.

> States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner or holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.
>
> It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases * * *.

Thus, the provisions of individual states which establish the electoral qualifications for primary elections, whether those primaries are open or closed, are within the bounds of the states' constitutionally granted right to regulate and control the electoral process. Although the specific provisions of each state have to comply with other constitutional mandates, it is indubitably for each state to determine the general makeup of the electorate of a primary election, pursuant to article I, section 2 and the Seventeenth Amendment. The Second Circuit gave no more than lip service to this fundamental principle.

III. *A political party's freedom of association is not infringed by a state's regulation of the primary electorate.*

Freedom of association, as protected by the First and Fourteenth Amendments, extends to an individual voter, a political candidate, and a political party. *Anderson v Celebrezze*, 460 U.S. at 787; *Democratic Party of the United States of America v Wisconsin ex rel. La Follette*, 450 U.S. 107, 121 (1981); *Cousins v Wigoda*, 419 U.S. 477, 487-488 (1975); *Kusper v Pontikes*, 414 U.S. 51; *Bullock v Carter*, 405 U.S. at 134. However, this right to associate is not absolute. *Democratic Party v Wisconsin*, 450 U.S. 124; *Roberts v United States Jaycees*, 468 U.S. ____, 104 S. Ct. 3244 (1984). The states' legitimate interest in determining the most effective means to protect the overall integrity of the electoral process, effected by legislating the qualifications required for the electorate at a primary election pursuant to article I, section

2 and the Seventeenth Amendment, is only an incidental burden on a political party's right to associate, regardless of whether that state provides for a closed or open primary. *See, Nader v Schaffer*, 417 F. Supp. 837, 845 (D. Conn.), *aff'd*, 429 U.S. 989 (1976).

A state statute must impose more than a minimal infringement on First Amendment associational rights before a strict scrutiny analysis is required. *See, Buckley v Valeo*, 424 U.S. 1, 20-22 (1976); *United States Civil Service Commission v National Association of Letter Carriers*, 413 U.S. 548, 567 (1973); *Socialist Workers Party v March Fong Eu*, 591 F.2d 1252, 1261 n.5 (9th Cir. 1978), *cert. denied*, 441 U.S. 946 (1979); *Nader v Schaffer*, 417 F. Supp. at 848-849. State statutes which merely determine, in a non-discriminatory manner, the appropriate qualifications for primary election voters place only an insubstantial burden on a political party's associational rights. There need only be a rational basis for the state's classifications of the electorate by a demonstration that "the classification is neither capricious nor arbitrary but rests upon some reasonable consideration of difference or policy." *Levy v Parker*, 346 F. Supp. 897, 902 (E.D. La. 1972), *aff'd*, 411 U.S. 978 (1973); *see also, Corning v Board of Elections of Albany County*, 57 N.Y.2d 746, 440 N.E.2d 1326, *aff'g* 88 A.D.2d 411 (3d Dep't 1982).

The Second Circuit erred in its determination that the state statute here in question was subject to the strict scrutiny test. The court below held that primary election eligibility requirements were not subject to the qualifications provision of article I, section 2 and the Seventeenth Amendment, and that Conn. Gen. Stat. § 9-431 unduly interfered with the political party's associational rights, derived from the First Amendment, thus requiring the statute to meet a strict scrutiny test. *Tashjian*, 770 F.2d at 275, 283. This conclusion, based upon the court's faulty interpretation of article I, section 2 and the Seventeenth Amendment, is wrong. Where, as here, the constitutional right to associate is regulated by the state's proper exercise of its power to set voter qualifications, the state statute will be subject to strict

scrutiny only if it places a substantial burden on the party's associational rights. Even the Second Circuit recognized that any intrusion by the State of Connecticut on the associational rights of the Republican Party of the State of Connecticut was "indirect", and only affected the Party "to some [limited] extent".[12] 770 F.2d at 282-283. The fact that the effectiveness of associational activity is impaired in some way does not mean that the regulation is an unconstitutional burden on the group's associational rights. *See Smith v Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979); *Brown v Alexander*, 516 F. Supp. 607, 614-615 (M.D. Tenn. 1981), *aff'd* 718 F.2d 1417 (6th Cir. 1983). Thus, the statute here in question need only meet the rational basis test.

Conn. Gen. Stat. § 9-431, like similar statutes in many other states, has such a rational basis. It allows the State to protect the integrity of the primary nominating process and to preserve an orderly and controlled means of determining party nominees for placement on the general election ballot. *Cf. American Party of Texas v White*, 415 U.S. at 781. The prospect of a system which would allow each political party in each state to determine who may vote in its primary, with virtually no limitation on the frequency or extent to which a party could make such changes, raises the specter of nomination by the "smoke-filled room" process.[13] If a party were left as free as the Second Circuit would have it to change the rules as to who may vote in a primary, the party leadership, with control of the rule-making process, could alter party procedures such that its desired nominee would be most likely to prevail at the primary, thereby giving the leadership the effective power to determine the party's candidate. It was the desire to protect against such misuse of power, certainly

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[12] The bracketed word "limited" was contained in the court's original opinion, but does not appear in the reported version of the decision. Appendix to Jurisdictional Statement at 111.

[13] Lowell P. Weicker, Jr., one of the appellees in this case, filed an *amicus curiae* brief in *Nader v Schaffer*, in which the process of nomination by the party leadership, described as the "smoke-filled room", was presented.

not unknown in our Nation's history. that led to the State's regulation here, and there can be small doubt that this is a rational basis.

Further, the states have responsibilities designed to insure fair, honest elections, such as ballot preparation and certification of results, which could be disastrously affected by a broad rationale of associational rights which in reality leaves the decision-making power with the parties. Thus, Connecticut's statute, like that of other states, has a rational basis and is a proper exercise of the State's constitutional right to regulate primary elections.

The Second Circuit's rationale for holding Conn. Gen. Stat. § 9-431 unconstitutional is overly broad. By finding that primary elections are not subject to the qualifications requirements of the Constitution, the court has, in effect, eliminated the authority for the states to regulate primary elections in any significant way. Although the decision spends a great deal of time discussing historical commentators, such as DeTocqueville, on the right of association, there is no historical discussion of the genesis of primary elections and their role in the party system. *Tashjian*, 770 F.2d at 275-276. This glaring omission, together with the court's failure to consider today's political reality, results in an opinion which effectively grants political parties the sovereign power of the state with regard to primary elections.

For example, in New York State the regulation of primaries originated in an attempt to make the parties truly representative of the people. Moscow, *Politics in the Empire State*, 55-56 (1948); Peel, *The Political Clubs of New York City*, 153-155 (1968); Mushkat, *The Reconstruction of the New York Democracy, 1861-1874* (1981). To a great extent, primary regulation was a reaction to the political mores of the day, which included "Bossism", smoke-filled rooms, and the political machinery of Tammany Hall. *Stebbins*, Political History of the State of New York (1913); *Forrest & Malcolm*, Tammany's Treason (1913). To say now, as the Second Circuit does, that these groups cannot be subject to any state regulation because of the vaguely-defined associational rights of political parties, is to invite a return to the politics of

one hundred years ago. It is not unduly speculative to conjecture that if the way in which parties define their membership and their endorsement of candidates can no longer be regulated in an even-handed matter by the state, control of the political parties once again may fall to a few powerful interest groups.

The importance of state regulation of the primary system has been noted by the courts for many years:

> It is too plain for argument, and it is not contested here, that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election or by party convention.

American Party of Texas v White, 415 U.S. at 781; *see also, Storer v Brown*, 415 U.S. at 733-736. A primary election, furthermore, is not wholly a private party matter. When the electorate votes in a primary, it is engaged in the process of selecting persons to fill public office, which is clearly a matter of state concern. *Lynch v Torquato*, 343 F.2d 370, 372 (3d Cir. 1965); *see also, Rivera-Rodriguez v Popular Democratic Party*, 457 U.S. at 12 n.12. It has been widely recognized that these elections can, therefore, be regulated by the state. *Anderson v Celebrezze*, 460 U.S. 787-789; *Democratic Party v Wisconsin*, 450 U.S. 111 n. 4; *Illinois State Board of Elections v Socialist Worker Party*, 440 U.S. 184-185; *Jenness v Fortson*, 403 U.S. 432; *Smith v Allwright*, 321 U.S. 657; *Socialist Worker Party v Fong Eu*, 591 F.2d at 1261. The Second Circuit decision leaves no room for regulation of this or any other type, and has the potential to undo one hundred years of election law reform.

In New York, political parties did not enjoy any special status at common law; they are wholly a statutory creation. New York Election Law, §§ 2-100 - 2-128. The statutory scheme regulates every aspect of the party, including the creation of state and local party committees (*id.*, § 2-100); national party conventions (*id.*, § 2-122); and party funding (*id.*, § 2-126). It is anomalous for the Second Circuit to say, after the state has created the party,

that the associational rights of the party crea' ' an exemption from state regulation. The very act of creating the party constitutes regulation, as it distinguishes the party from other, less well-defined political entities.

New York grants special privileges and protections to its major political parties. The authority to place candidates on the general election ballot is delegated, to a great extent, to the political parties. New York Election Law, §§ 6-120, 6-124, 6-126. Furthermore, the cost of primary elections, which include the selection of party officials (*id.*, §§ 2-110, 4-110, 6-134, 7-116), is assumed by the State. *Id.*, §§ 4-136, 4-138. It is not unreasonable to allow the State some say in how these primary elections are conducted, especially when the parties participate pursuant to the privilege granted by the State. Justice Holmes has addressed this issue in the following way:

> It would be a strange inversion to say that no laws can be passed upon the mode of voting at a preliminary meeting held only for the purpose of getting names printed upon an official ballot when laws can be passed affecting the final vote. *The Legislature has a right to attach reasonable conditions to that advantage, if it has a right to grant the advantage.*

Commonwealth v Rogers, 181 Mass. 184, 63 N.E. 421, 423 (1902) (emphasis supplied). Under the Second Circuit's ruling, the State could not regulate these matters.

The idea of a primary election itself arises from the notion that the leadership of a political party is not totally free to determine who it may nominate. In order to enjoy the privileges granted to the parties by the State, such as representation on county boards of election (New York Election Law, § 3-200[2]), the parties must act in accordance with the State's legitimate regulatory concerns. This process ensures that fairness prevails. *Anderson v Celebrezze*, 460 U.S. 780; *Democratic Party v Wisconsin*, 450 U.S. 107. Parties are granted these privileges because they institutionalize identifiable political bases of broad support among

the populace. *Jenness v Fortson*, 403 U.S. at 439-441. If the right of association is as broad as that delineated by the Second Circuit, the significance of the party as a representative of an ideology or an identifiable group of voters becomes meaningless. Indeed, under the rationale of the Second Circuit decision, a state lacks the power to compel that a primary election be held at all. If the party leadership were to decide not to hold a primary, they could effectively deny representation to a large part of the population. Such a proscription could turn the doctrine of associational rights into a prescription for the clubhouse politics of the past.

CONCLUSION

For all these reasons the State of New York, joined by the states of Alabama, Arizona, Delaware, Florida, Illinois, Louisiana, Maine, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee and Wyoming, as *amici curiae*, urge this Court to reverse the ruling of the Court of Appeals for the Second Circuit and hold that Conn. Gen. Stat. § 9-431 is constitutional.

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